

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY KING, MARIAN SHERIDAN,
JOHN HAGGARD, CHARLES RITCHARD,
JAMES HOOPER, DAREN RUBINGH,

Plaintiffs,

v.

No. 2:20-cv-13134

Judge Linda V. Parker

Mag. R. Steven Whalen

GRETCHEN WHITMER, in her
official capacity as the Governor of the
State of Michigan, JOCELYN
BENSON, in her official capacity as
Michigan Secretary of State and the
Michigan BOARD OF STATE
CANVASSERS,

Defendants,

and

CITY OF DETROIT, DEMOCRATIC
NATIONAL COMMITTEE and
MICHIGAN DEMOCRATIC PARTY,

Intervenor-Defendants.

**Gregory Rohl, Brandon Johnson, Howard Kleinhendler, Sidney
Powell, Julia Haller, and Scott Hagerstrom's
Response to the City of Detroit's
Supplemental Brief in Support of Sanctions [ECF No. 164]**

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Introduction

Plaintiffs did not sue the City of Detroit for a reason. None of the relief requested could have been provided by the City. Now it uses the Court's questions at the July 12, 2021 hearing as an invitation to present charged, politicized rhetoric. These motions call for calm legal and factual analysis, not a political one.

As explained in our prior submission, the only correctly filed motion before this Court is under 28 U.S.C. § 1927. But the circumstances of this case come nowhere near conduct that could satisfy the Sixth Circuit's test for Rule 1927 relief. Bias is hard for attorneys to avoid and it is undoubtedly no less difficult for judges. *See, e.g., Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016). The difference is that there can be no tolerance for the influence of such bias on a judicial decision *Id.* at 1909. The issue of sanctions cannot be a partisan political exercise. Therefore, the sanctions motions before this Court should all be denied.

Argument

1. The City did not serve a proper Rule 11 safe-harbor motion.

Serving a Rule 11 motion required by Fed. R. Civ. P. 11(c)(2) in accordance with Fed. R. Civ. P. 5 is only one component of Rule 11's safe-harbor provisions.¹

¹ The City did not mail a copy to Brandon Johnson's actual addresses, even though that information was available through the District of Columbia Bar's website. Moreover, the motion that the City served only sought concurrence from Sidney Powell. *See* ECF No. 164-4, PageID.6409, n. 1.

An equally critical component is the substance of the documents served under Rule 5. *See* Fed. R. Civ. P. 11(c)(2). That’s where the City’s service fails.

The City did not comply with Rule 11(c)(2). The documents that Nathan Fink served on December 15, 2020 were not the motion and accompanying 38-page brief that the City of Detroit filed on January 5, 2021 (Safe-Harbor Notice, within ECF No.164-3, PageID.6395-6404; Motion for Sanctions, ECF No. 78). Consequently, as explained in the Attorneys’ supplemental brief, those documents were insufficient to trigger the 21-day safe-harbor period under Rule 11(c)(2) (ECF No. 161, PageID.5805-5806).

The City’s brief presents no arguments and cites no authority demonstrating that the *content* of the mailing satisfied Fed. R. Civ. P. 11(c). Indeed, the City failed to meet the obligations imposed under Rule 11. It repeatedly insists that it served a “Rule 11 letter” or a “Safe Harbor Letter.” (ECF No. 164, PageID.6136-6137). But Rule 11 requires a motion, not a letter. *Penn, LLC v. Prosper Business Development Corp.*, 773 F.3d 764, 768 (6th Cir. 2014). And this Court’s Local Rules make it clear that there’s no motion without an accompanying brief. *See* L.R. 7.1(d)(1). Allowing a party to serve a notice devoid of legal authority (other than perfunctory references to Rule 11 itself) undermines the very purpose of Rule 11. *Penn*, 773 F.3d at 768. The City is not entitled to sanctions under Rule 11.

2. The City's silence concedes no *sua sponte* sanction under Rule 11.

At the July 12, 2021 hearing, this Court stated for the first time that it was considering sanctions under Rule 11(c) and its inherent authority. (July 12, 2021 transcript, p. 11, ECF No. 161-2, PageID.5834). But Rule 11(c) prohibits monetary sanctions under a court's inherent authority unless a court issues a show-cause order *before* the case was dismissed. *See* Fed. R. Civ. P. 11(c)(5)(B). *See also* ECF No. 161, PageID.5804 (explaining that the timing limitations under Rule 11(c) apply to this Court's inherent authority).

The undersigned highlighted this rule at the July 12, 2021 hearing. (July 12, 2021 transcript, pp. 13-14, ECF No. 161-2, PageID.5836-5837). In response, the City insisted that “the rule itself does not include that requirement,” and “[t]he rule simply says on its own the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).” (July 12, 2021 transcript, p. 14, ECF No. 161-2, PageID.5837). The City's statements to the Court were wrong. *See* Fed. R. Civ. P. 11(c)(5)(B). (And the City made no effort to remedy its misstatements in its supplemental brief). This Court did not provide notice under Rule 11(c)(3) before voluntary dismissal. Therefore, it cannot impose monetary sanctions on its own motion now.

3. The City's supplemental brief misrepresents the actual evidence.

The City dedicates a significant portion of its supplemental brief to a statement

in paragraph 10 of Russell Ramsland’s November 24, 2020 affidavit. It claims that Ramsland averred that an issue in the Antrim County election results was “only discoverable through a hand counted manual recount.” (ECF No. 6-24, PageID.1573, at ¶ 10.) The Court highlighted this item as well. (July 12, 2021 transcript, p. 94, ECF No. 161-2, PageID.5917).

Ramsland *never* asserted that he personally knew about a hand recount. He averred, “In Michigan *we have seen reports* of 6,000 votes in Antrim County that were switched from Donald Trump to Joe Biden and were only discoverable through a hand counted manual recount.” (ECF No. 6-24, PageID.1573, ¶ 10) (emphasis added). As Julia Haller and Howard Kleinhendler noted at the July 12, 2021 hearing, the media *did* report that Antrim County performed a hand recount.² For example, on November 5, 2021, Click on Detroit (website for the local NBC affiliate station) reported that the county had not yet posted its election results. *See* Dane Kelly, *Why is Antrim County’s vote count at 0%?*, Click on Detroit (Nov. 5, 2020), <https://bit.ly/3ij1LYI> (*Attachment A*). The delay, according to the article, was because “the county is recounting the ballots manually by hand.” *Id.*

The City’s focus on a single phrase in Ramsland’s affidavit also obfuscates

² Paul Steeno, *Antrim County Submits New, Partial Election Results After Manually Counting Votes*, UpNorthLive ABC 74 (Nov. 5, 2020), <https://upnorthlive.com/news/local/antrim-county-submits-new-partial-election-results-after-manually-counting-votes> (*Attachment B*).

both the main point of that paragraph and the central opinions in the report. His ultimate opinion on the Antrim County issue was that “a full investigation of this event needs to be conducted as there are a reported 47 other counties using essentially the same system in Michigan.” (ECF No. 6-24, PageID.1573, ¶ 10.)

The City doesn’t acknowledge in its supplemental brief that the Attorneys did, in fact, obtain clarification regarding Ramsland’s opinions and the evidence underlying them. Their December 3, 2020 reply in support of their motion for declaratory, emergency, and permanent injunctive relief—filed before the City of Detroit filed a motion to dismiss or moved for sanctions—proffered an updated report prepared by Ramsland (ECF No. 49-3, PageID.3111-3142). The report cites updated evidence and data, including updated statistics supporting his opinion that the reported levels of voter turnout were improbable. (*Id.*)

The City’s strategy is to distract this Court from the wide body of affidavits, expert reports, and other evidence presented with the plaintiffs’ filings. But this Court must consider the circumstances as a whole. *Michigan Div.-Monument Builders of N. Am.*, 524 F.3d 726, 739 (6th Cir. 2008) (“In this circuit, the test for the imposition of Rule 11 sanctions is whether the individual attorney's conduct was reasonable under the circumstances.”) (cleaned up). The City has not challenged the overwhelming majority of the material aspects of the affidavits and reports prepared by the plaintiffs’ experts. Nor has it argued that the affiants were deliberately

untruthful.³ Sanctions are not justified under the Sixth Circuit’s test.

4. This Court cannot award sanctions based on appellate filings.

The Attorneys did not multiply these proceedings. (ECF No. 161, PageID.5808-5810, 5816-5817, 5819). And contrary to the City’s reliance on Plaintiffs’ appeal and arguments to the Sixth Circuit and Supreme Court, this Court cannot issue sanctions under Rule 11 or § 1927 based on appellate proceedings. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990) (Rule 11); *In re Cardizem CD Antitrust Litig.*, 481 F.3d 355, 362 (6th Cir. 2007) (§ 1927); *Webster v. Sowders*, 846 F.2d 1032, 1039–40 (6th Cir. 1988) (stating that “a trial judge cannot sanction a party or lawyer for taking an appeal”). The City’s arguments are factually and legally unsustainable.

³ This Court’s questioning reflected the influence of the City’s strategy. For example, this Court believed that Jessica Connarn’s affidavit was premised on “triple hearsay.” (July 12, 2021 transcript, pp. 136-137, ECF No. 161-2, PageID.5959-5960). Reading her affidavit (ECF No. 6-6) with Jessy Jacobs’ affidavit (ECF No. 6-4) provides context. Connarn attested that she spoke to a poll worker directly. The affidavit corroborates the same conduct described in the affidavit of Jessy Jacobs, who attests that she was directed to change absentee ballot dates.

In any event, reliance on hearsay is not improper—much less sanctionable—at the injunction stage. *Damon’s Rest. Inc. v. Eileen K Inc.*, 461 F. Supp. 2d 607, 620-621 (S.D. Ohio 2006); *Concentrix CVG Customer Mgmt. Grp. Inc. v. Daoust*, No. 1:21-CV-131, 2021 WL 1734284, at *7 (S.D. Ohio May 3, 2021); *Bazzy Invs. v. City of Dearborn*, No. 16-10879, 2018 WL 10962765, at *3 (E.D. Mich. Aug. 2, 2018). *See also In re DeLorean Motor Co.*, 755 F.2d 1223, 1230 n. 4 (6th Cir. 1985) (declining to address admissibility of hearsay at injunction stage).

5. Fraud does vitiate everything.

The City highlights Mr. Kleinhendler’s reference to *United States v. Throckmorton*, 98 U.S. 61, 66 (1878), at the July 12, 2021 hearing, claiming that his citation of this case shows that the Attorneys “support[ed] their claims with internet memes” (ECF No. 164, PageID.6142-.6143) (cleaned up). This argument is misguided in three senses.

First, Supreme Court opinions don’t have expiration dates. Either they are overruled or they remain law. The City cites no precedent overruling *Throckmorton* or the “fraud vitiates everything” maxim. Second, a Supreme Court opinion doesn’t stop being law just because it’s cited in social media. Third, the legal maxim cited in *Throckmorton* remains good law.⁴ And the City’s attorneys know that. They were counsel of record in a 2014 lawsuit in which Judge Lawson cited the “fraud vitiates everything it touches” principle. *Llewellyn-Jones v. Metro Property Group, LLC*, 22 F. Supp. 3d 760, 785 (E.D. Mich. 2014). The City’s characterization of the “fraud vitiates everything” principle is deeply unfair. (ECF No. 164, PageID.6143).

⁴ See *Computer Leasco, Inc. v. NTP, Inc.*, 194 Fed. Appx. 328, 329 (6th Cir. 2006) (citing rule that “fraud vitiates everything”); *L.A. Insurance Agency Franchising, LLC v. Montes*, 2016 WL 922948, *9 (E.D. Mich., March 11, 2016) (citing *Custom Data Solutions, Inc. v. Preferred Capital, Inc.*, 733 N.W.2d 102, 105 (Mich. Ct. App. 2006), for the principle that “fraud vitiates everything it touches”); *JAC Holding Enterprises, Inc. v. Atrium Capital Partners, LLC*, 997 F. Supp. 2d 710, 730 (E.D. Mich. 2014) (same).

The City's attempt to make this case about *Throckmorton* also mischaracterizes the pleadings and briefs and ignores the body of authority underlying the Attorneys' filings. Plaintiffs' amended complaint cited extensive Michigan and federal authority in support of their claims (ECF No. 6). And their claims and relief requested were not unprecedented. (See the authority cited in the Attorneys' supplemental brief, ECF No. 161, PageID.5810-5815.) Nor were they unique. The City doesn't acknowledge this fact, but 17 other Attorneys General and 106 members of Congress joined Texas attorney general Ken Paxton in raising claims of fraud in Michigan.⁵ Simply put, the City mischaracterizes the Attorneys' filings.⁶

Worse, the City purports to invoke the Court's Civility Rules while openly

⁵ See, e.g., Nomaan Merchant and Alanna Durkin Richer, *Hundreds of GOP members sign onto Texas-led election lawsuit*, <https://bit.ly/3rKMKle> (last visited August 1, 2021).

⁶ So do the State Defendants. See *Defendants Whitmer and Benson's Combined Response to Supplemental Briefs Filed by Plaintiffs' Counsel* (ECF No. 166, PageID.6584). They falsely argue that *O'Rourke v. Dominion Voting Systems*, Case No. 1:20-cv-03747 (D. Col. August 3, 2021), is similar to this case. In fact, the plaintiffs in the Colorado case filed a class action on behalf of *all American Voters*. They alleged a conspiracy among four governors, Facebook, Mark Zuckerberg, Priscilla Chan (Zuckerberg's wife), and others. They sought \$160 billion in damages. Unlike the plaintiffs in this case, the plaintiffs in the Colorado case gave no thought to standing or jurisdiction—such as whether a federal court in Colorado would even have jurisdiction over governors acting in another state. The State Defendants' argument simply ignores the actual content of the Colorado suit.

breaching them. For example, it accuses the Attorneys of having “blood on their hands.” (ECF No. 103, PageID.4181). This is a false and reprehensible accusation. The City cannot cite any evidence that a single person participating in the January 6, 2021 insurrection drew inspiration from this lawsuit. The City spews this bad-faith, inflammatory, partisan rhetoric in an apparent effort to prejudice the Court.

Conclusion

Distrust in election security existed on both sides of the aisle well before Election Day. *See* Chris Kahn, *Four in ten supporters of Biden, Trump would not accept election defeat: Reuters/Ipsos poll*, Reuters (October 25, 2020), available at: <https://reut.rs/37gdKQa> (last visited August 1, 2021). Plaintiffs’ lawsuit didn’t sow doubt; it was the product of doubt that already existed and that will continue to exist in future elections. If this Court grants the motions for sanctions, it will chill parties concerned with election security from bringing important challenges and significant concerns before the judiciary. Declining to impose sanctions will affirm that such challenges can be safely made and will be treated fairly.

The Court should deny the sanctions motions.

Respectfully submitted,

COLLINS EINHORN FARREL PC

By: /s/ Donald D. Campbell

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Dated: August 4, 2021

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Certificate of Service

I certify that, on August 4, 2021, I electronically filed the above with the Clerk of the Court using the ECF system, and that a copy was electronically served on all parties via the ECF system.

COLLINS EINHORN FARRELL PC

/s/ Donald D. Campbell

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Kleinhendler, Sidney Powell, Julia Haller, and Scott Hagerstrom's
Response to the City of Detroit's Supplemental Brief in Support of
Sanctions [ECF No. 164]**

Attachment	Description
A	Dane Kelly, <i>Why is Antrim County's vote count at 0%?</i> , Click on Detroit (Nov. 5, 2020).
B	Paul Steeno, <i>Antrim County Submits New, Partial Election Results After Manually Counting Votes</i> , UpNorthLive ABC 74 (Nov. 5, 2020)

Attachment A

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A beach hazard statement in effect for Sanilac and St. Clair Regions

DECISION 2020

Why is Antrim County's vote count at 0%?

Clerk's office calls original results 'incorrect'

Dane Kelly, Web Producer

Published: **November 5, 2020 9:12 am**

Tags: **Michigan Election, Michigan, Biden, Trump, Count, Recount, Antrim County, Michigan Politics, Election Results, Decision 2020, Presidential Election, Local, Local News, Michigan News, Michigan Election News, Bellaire**

NEWSSPORTSFEATURESLIVE IN THE DANN ARBORWEATHER

Antrim County 2020 General Election results as of 8 a.m. Thursday, Nov. 5. (WDIV)



BELLAIRE, Mich. – As of 9 a.m. Thursday, Antrim County is the only county in Michigan that doesn't have election results in.

The county's website has election results from its May election, the August and March primaries, and the November 2019 election. So why isn't there anything reported for the 2020 General Election?

The short answer is the county is recounting the ballots manually by hand.

Between 1884 and 2016, Antrim County voters have selected Republican candidates in 32 of the 34 national elections. In 2016, President Donald Trump won the county with about 8,500 votes -- nearly twice as many votes as former U.S. Secretary of State Hillary Clinton received in the county.

When the unofficial results were posted Wednesday morning, former Vice President Joe Biden was in the lead in Antrim County by 3,200 votes, with 98% of the estimated votes reported.



Antrim County clerk Sheryl Guy said the results were “**apparently skewed**” and the information was pulled from the county website. County officials said the results were incorrect and **the vote totals counted by election software did not match the printed count.**

Officials said the company that makes the software is **cooperating with the county to help find out why the counts did not match.**

Antrim County contributes **a little more than 22,000** to Michigan's 8 million registered voters. The recount won't greatly impact **Biden's 150,000 lead over Trump or Sen. Gary Peters' 88,000 lead over John James**, but if there is a counting error, it would greatly impact local elections in Antrim County.



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"The priority is to make sure every vote is counted correctly," said **Antrim County public information officer Jeremy Scott**. "Rest assured, we are correcting the issue and the system worked."

Biden won Kent and Saginaw counties, both of which were won by Trump in 2016. However, neither county has the historic consistency of Antrim County. Former president Barack Obama won Kent County in 2008 and, more recently, **Gov. Gretchen Whitmer won the county in 2018**.

In 2016, Trump was the first Republican to win Saginaw County since Ronald Reagan in 1984. The political reversal of Antrim County warrants a more thorough pair of eyes to see if there was a computer or human error in the count.

Ad

New -- and more accurate -- results for the county are expected to be released Thursday after an **independent board of canvassers verifies the vote count**.

- **More:** [Decision 2020 election coverage](#)

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ABOUT THE AUTHOR:



Dane Kelly



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Common sense • NOVEMBER 5, 2020

Please stop.

Stop creating fear of the "missing votes"

Stop creating the "vote suppression" ideal

Just Stop.

This is not news.

It is fear mongering

REPLY ^ 1 ▾ 1



Maureen • NOVEMBER 5, 2020

It was on the news. They voted and Biden won. One of the observers said that 53 votes were not counted so they are recounting every vote.

REPLY 2 REPLIES ^ 3 ▾ 3



CONTENT DEACTIVATED

1 REPLY



Steppy 412 • NOVEMBER 5, 2020

Reply to **Alan Blaufeld**

Read the article on this website.

REPLY ^ 1 ▾ 2



Add your reply



CONTENT DEACTIVATED



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1

SHOW OLDER REPLIES



john • NOVEMBER 5, 2020

Hope this was human error. If not big can of worms.

REPLY ^ 1 v 1



Cindy • NOVEMBER 5, 2020

very questionable...thought sos benson was in charge of accuracy...seems not.

REPLY 2 REPLIES ^ 5 v 4

1

SHOW OLDER REPLIES



Steppy 412 • NOVEMBER 5, 2020

Reply to Cindy

The clerk said that at least 33 other counties in MI use the same software. Seems you'd have to look into each of them.

REPLY ^ 2 v 2



Add your reply



Steppy 412 • NOVEMBER 5, 2020

At least 33 other counties use the same program.

REPLY ^ 1 v 4

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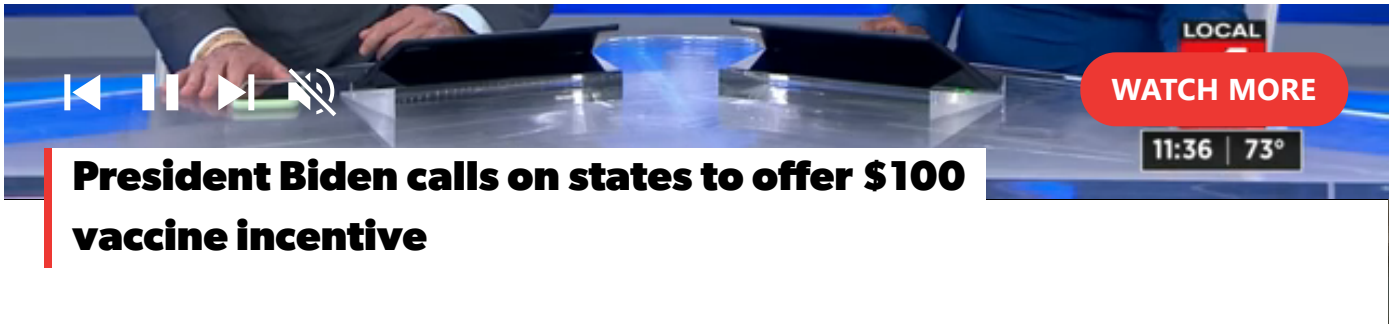
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Attachment B



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 76°

 70°

GENERAL ALERT: 2020 Tokyo Olympics


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Antrim County submits new, partial election results after manually counting votes

by Paul Steeno
Thursday, November 5th 2020

AA



The Antrim County Clerk's Office has completed and submitted partial unofficial election results after it was discovered that the results posted early Wednesday morning were incorrect. (WPBN)









The Antrim County Clerk's Office has completed and
its after it was discovered that the results posted early
Wednesday morning were incorrect.

Search Site
Guy said.



Sheryl

They said they roll out the printed tabulated tapes from each precinct, look at each number and manually enter it into the computer.

"It's really difficult because of the second guessing and the unknowns," Guy said. "We work with our software programs. When we put those programs together we expect them to be correct. It does become an issue when you feel like you're being criticized or underhanded or a possible fraud because that's not here in Antrim County."

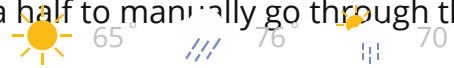
A large rectangular area with a light gray background. In the center is a small square icon with a gray border and a white 'X' inside. Below the icon is the text "Ad removed. [Details](#)".

Upstairs, the Board of Canvassers is at work as well.

"They are looking at the summary statement of votes," Guy said. "They are looking at the tabulator tapes they are determining the statement of votes adds up to the reported number of ballots cast."



out a day and a half to manually go through the
rtant.



"Be reassured that we are doing the best we can as fast as we can and every vote that was cast

Search Site



"We absolutely understand your frustration and public scrutiny is welcomed," Antrim County Spokesperson Jeremy Scott said. "Your votes are being counted, we're counting accurately every vote."


The clerk did tell us that other counties in Michigan use the same election software as they do but she said she's not aware of other places having problems.

While the updated results posted on Thursday include totals for National and State elections and proposals, Guy said they do not include totals from local elections.

Guy said the Board of Canvassers has begun their work on reviewing and providing official results. The remainder of the Unofficial results will be posted tomorrow, November 6, as the Clerk's Office completes the work.


Those partial unofficial results can be viewed below:







UpNorthLive

abc 24







65°



76°




70°



Antrim County
News Release

Search Site



FOR IMMEDIATE RELEASE




Contact: Jeremy Scott, Public Information Officer
231-533-6265, scottj@antrimcounty.org

Antrim County Election Results

ANTRIM COUNTY, Mich. – The Antrim County Clerk's Office has completed and submitted partial Unofficial election results which are attached. "We want to thank everyone for their patience as we continue to work through this situation," Sheryl Guy, Antrim County Clerk said. While these results include totals for National and State elections and proposals, they do not include totals from local elections (village, township and schools). In the meantime, the Board of Canvassers has begun their work on reviewing and providing official results. The remainder of the Unofficial results will be posted tomorrow, November 6, as the Clerk's Office completes the work.

###


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[11-5 Partial Unofficial Ele...](#) by [Trevor Drew](#)

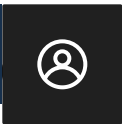
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